Jurisdictional Statement

81-226

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No. 81-

IN THE

Supreme Court of the United States

October Term, 1981

TOWN OF HARDENBURGH, ULSTER COUNTY, NEW YORK; ROBERT WOODARD; ETHEL WOODARD; LESTER BOURKE, as Supervisor of the Town of Hardenburgh, and ROBERT BARNHART, MARKS BUERGE, and VINCENT PRIOR as members of the Town Board of the Town of Hardenburgh,

Appellants,

against

THE STATE OF NEW YORK and THE NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Questions Presented by the Appeal.

1. Is Chapter 738 of the Laws of 1978 of the State of New York, which changed the requirements for tax exemption of real property for religious purposes, constitutional?

2. Is said Chapter 738 constitutional as to the individual appellants whose real property was previously entitled to religious exemption but is not entitled to exemption under Chapter 738?

3. Does Chapter 738 have a valid, secular purpose?

4. Was Chapter 738 adopted for an impermissible religious purpose?

5. Does Chapter 738 impermissibly entangle religion and the political process?

6. Does the Town of Hardenburgh have standing to bring this action?

7. Do the officials of the Town of Hardenburgh have standing to bring this action?

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No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

TOWN OF HARDENBURGH, ULSTER COUNTY, NEW YORK; ROBERT WOODARD; ETHEL WOODARD; LESTER BOURKE, as Supervisor of the Town of Hardenburgh, and ROBERT BARNHART, MARKS BUERGE, and VINCENT PRIOR as members of the Town Board of the Town of Hardenburgh,

Appellants,

against

THE STATE OF NEW YORK and THE NEW YORK STATE BOARD OF EQUALIZATION and ASSESSMENT,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

Statement of Jurisdictional Grounds.

i. The action seeks a declaration that Chapter 738 of the Laws of 1978 of the State of New York is unconstitutional.

ii. The order and judgment appealed from is dated April 30, 1981. The notice of appeal herein was filed on June 15, 1981 in the Court of Appeals of the State of New York.

iii. Jurisdiction is conferred on this Court by virtue of the determination of the highest court of the State of New York that Chapter 738 of the year 1978 of the Laws of the State of New York is constitutional.

Statement of Constitutional and Statutory Provisions.

United States Constitution, First Amendment:

Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; * * *

United States Constitution, Fourteenth Amendment, Section 1:

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Real Property Tax Law, Section 436 (prior to amendment by Chapter 738 of the Laws of 1978.):

Real property held by any officer of a religious denomination shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments, subject to the same conditions and exemptions, as property owned by a religious corporation.

New York State Real Property Tax Law, Section 436 (after amendment by Chaper 738 of the Laws of 1978):

Real property held in trust by a clergyman or minister of a religious denomination for the benefit of the members of his incorporated or unincorporated church shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments as authorized by section four hundred twenty-one of this chapter; provided that such real property shall satisfy all the conditions and exceptions set forth therein including that the property so held be used exclusively for one or more of the purposes enumerated in paragraph (a) of subdivision one of section four hundred twenty-one of this chapter.

For purposes of this section, "clergyman," "minister," "incorporated church," and "unincorporated church" shall be defined as in section two of the religious corporations law.

New York State Real Property Tax Law Section 462:

In addition to the exemption provided in section four hundred twenty of this chapter, property owned by a religious corporation while actually used by the officiating clergyman thereof for residential purposes shall be exempt from taxation.

Chapter 738 of the Laws of New York State, 1978:

Section 1. Section four hundred thirty-six of the real property tax law is hereby amended to read as follows:

§ 436. Officers of religious denominations

Real property ~~by any officer~~ held *in trust by a clergyman or minister* of a religious denomination *for the*

benefit of the members of his incorporated church or unincorporated church shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments, ~~subject to the same condi and exceptions, as property owned by a religious corporation~~ *as authorized by section four hundred twenty-one of this chapter; provided that such real property shall satisfy all the conditions and exceptions set forth therein including that the property so held be used exclusively for one or more of the purposes enumerated in paragraph (a) of subdivision one of section four hundred twenty-one of this chapter.*

*For purposes of this section, "clergyman," "minister," "incorporated church" and "unincorporated church" shall be defined as in section two of the religious corporations law.**

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law.

Statement of the Case.

Chapter 738 of the laws of New York of 1978 (effective January 1, 1979) was adopted to terminate tax exemptions which had previously been granted to property held by officers of the Universal Life Church pursuant to Real Property Tax Law §436 and 462.

The individual plaintiffs and members of the plaintiff class are officers of the Universal Life Church whose property had previously been exempted from real property taxation by virtue of RPTL §436 and 462. They do not qualify for exemption under the law as amended (and have been denied exemption in subsequent years).

Chapter 738 of the laws of 1978 made two significant changes in the exemption laws concerning religions owned

*Crossouts indicate deletions; italics indicate new material.

by individuals in New York: a) it requires that the properties be put in trust; and 2) it requires that the owners be ministers, rather than officers, of a church.

Prior to the adoption of Chapter 738, and since 1799, properties in New York State owned by an officer of a religious denomination and used for public worship, have been entitled to exemption from real estate taxation, without being held in trust.

From 1893 to 1978, properties in New York State owned by an officer of a religious denomination and actually used by the officiating clergyman of a church have been entitled to exemption from real estate taxation, without being held in trust.

The Courts below found that Chapter 738 made substantive changes in the pre-existing law:

> However, the statute did not, prior to 1978, explicitly require that equitable title be in a religous denomination. Further, while an officer of a religious denomination might not be someone who would be a spiritual leader thereof, the 1978 amendment by restricting the exemptions to clergymen and ministers as defined in Section 2 of the Religious Corporation Law, has narrowed the class of exempt persons.
>
> Upon its face, the 1978 amendment has changed the scope of the tax exemption by eliminating any tax exemption where the property is not equitably owned by a religious denomination. Such a change cannot be treated as a mere clarification of the former section 436, which appeared upon its face to simply require a use for religious purposes and *not* a concurrent equitable interest by a religious denomination. (Cf. *Wolek v. City of New York,* 131 Misc. 37.) (*Town of Hardenburgh vs. State of New York,* 72 A. D. 2d 192, 424 N. Y. S. 2d 531, 532-3.)

The Town of Hardenburgh and its officials joined in the action both because a) they are called upon to enforce what they perceive to be an unconstitutional law, and b) the finances of the Town would be thrown into havoc unless the constitutionality of Chapter 738 were early determined—a significant number of properties having been previously exempted but whose owners "under the amended wording of the law, are now unable to qualify for exemption." (*Town of Hardenburgh vs. State of New York*, 52 N. Y. 2d 536, 439 N. Y. 2d 303.)

The issues of the constitutionality of Chapter 738 of the laws of 1978; the constitutionality of Chapter 738 as to the individual appellants; and the standing of the Town of Hardenburgh were all first raised in the complaint.

The issue of the standing of the officials of the Town of Hardenburgh was first raised in the amended complaint.

The specific constitutional questions concerning the secular purpose, the religious purpose, and the entanglement of religion and the political process were first raised in appellants' brief on the motion for summary judgment.

Special Term declared the law constitutional on motion as to the individual plaintiffs; but held that the Town and its officials had no standing. (99 Misc. 2d 1036, 418 N. Y. S. 2d 503.)

The Appellate Division, Third Judicial Department held that there was no justiciable controversy as to the individual plaintiffs and dismissed the action. (72 A. D. 2d 192, 424 N. Y. S. 2d 531.)

The Court of Appeals held that the individual plaintiffs have standing, while the others do not, and declared Chapter 738 to be constitutional.

Statement for Plenary Consideration.

In *Walz vs. Tax Commission of the City of New York*, 397 U. S. 664, this Court held:

> Any move that realistically "establishes" a church or tends to do so can be dealt with "while this Court sits." (*Walz vs. Tax Commission of the City of New York, supra,* 397 U. S. at 678.)

The "second step" which this Court found "has been long in coming" has now been taken. (*Walz vs. Tax Commission of the City of New York, supra,* 397 U. S. at 678.)

The State of New York has adopted a statute specifically intended to thwart the growth of a specific church: The Universal Life Church. Adherents of the Universal Life Church who qualified for and were granted exemptions have been denied those exemptions solely as a result of the adoption of Chapter 738 of the laws of 1978.

Chapter 738 amended Real Property Tax Law §436 (and indirectly RPTL §462 as well). These sections are part of Real Property Tax Law Article 4, which passed constitutional muster in *Walz*.

Chapter 738 undoes the very basis for this Court's determination that Article 4 was constitutional: it "dealt with a status under state tax laws for the benefit of all religious groups." (*Lemon vs. Kurtzman,* 403 U. S. 602, 623.) Indeed, Article 4 was saved by extending its benefits to a much broader class than religious institutions. (*Walz vs. Tax Commission, supra,* 397 U. S. at 672-3; see *Committee for Public Education vs. Nyquist,* 413 U. S. 756, 794; *Wolman vs. Essex,* 324 F. Supp. 399, 408; *Kosydar vs. Wolman,* 353 F. Supp. 744, 757, 758.)

The Universal Life Church is the only church affected by Chapter 738. The statute was adopted specifically to deny exemptions which had been granted to Universal Life Churches. The written memoranda in support of the legislation distinguish between "bona fide" and "legitimate" churches on the one hand and the Universal Life Church on the other.

Yet no suggestion is made anywhere in this litigation that the Universal Life Church is not a church and that its members do not qualify for exemption to the same extent as members of any other church.

In upholding the constitutionality of Chapter 738, the Court of Appeals was satisfied to find facial neutrality and a secular purpose. It did not apply or even mention the three prong test of *Lemon vs. Kurtzman.*

Facial neutrality will not save an otherwise unconstitutional statute. (*Gillette vs. United States,* 401 U. S. 437, 452; *Fowler vs. Rhode Island,* 345 U. S. 67, 69.)

Chapter 738 does not have a valid, secular purpose. The purpose adduced by the Court of Appeals is itself a religious purpose. Lacking a valid secular purpose the statute is unconstitutional.(*Lemon vs. Kurtzman, supra,* 403 U. S. at 612-13; see also *Committee for Public Education and Religious Liberty vs. Regan,* _____U. S. _____, 63 L. Ed. 2d 94, 102, 100 S. Ct. 840, 846; *Meek vs. Pittinger,* 421 U. S. 349, 358; *Committee for Public Education vs. Nyquist, supra,* 413 U. S. at 772-3; *Gillette vs. United States, supra,* 401 U. S. at 451.)

Chapter 738 was specifically adopted for impermissible religious purposes. The Governor was specifically advised that the statute related to the "Universal Life Church case

in Hardenburgh." The sponsors' memoranda are replete with the intention to deny exemption to churches of the Universal Life Church. Such a purpose violates the second prong of the *Lemon vs. Kurtzman* test. (*Lemon vs. Kurtzman, supra,* 403 U. S. at 612-13; see also *Epperson vs. Arkansas,* 393 U. S. 97, 103-4; *Abington School District vs. Schempp,* 374 U. S. 203, 214-15; *Braunfeld vs. Brown,* 366 U. S. 599, 607; *Zorach vs. Clanson,* 343 U. S. 306, 313, 314; *Everson vs. Board of Education,* 330 U. S. 1, 16.)

The adoption of Chapter 738 represented a defeat for the Universal Life Church in the political arena and was itself proof that the statute failed the third *Lemon vs. Kurtzman* test: "excessive government entanglement with religion." (*Lemon vs. Kurtzman, supra,* 403 U. S. at 612-13; *Committee for Public Education and Religious Liberty vs. Regan, supra,* _____U. S. at _____, 63 L. Ed. 2d at 102, 100 S. Ct. at 846; *Meek vs. Pittenger, supra,* 421 U. S. at 358; *Committee for Public Education vs. Nyquist, supra,* 413 U. S. at 772-3.)

The exemption denied in Chapter 738 had been the New York law in an unbroken line dating back to 1799:

> [Such] an unbroken practice of according the exemption to churches openly and by affirmative state action, not covertly or by State inaction, is not something to be lightly cast aside. (*Walz vs. Tax Commission of the City of New York, supra,* 397 U. S. at 678.

The aspects of the *Lemon vs. Kurtzman* "test are in the conjunctive and all must be satisfied to withstand constitutional scrutiny." (*Wolman vs. Essex,* 342 F. Supp. 399, 411.) Yet the Court of Appeals did not even discuss the second and third prongs of the test.

Confusing an "establishment" case with "free exercise" cases, the Court of Appeals held that plaintiffs have not "shown any particular religious practice or belief with which the statute interferes." A statute which violates the establishment clause is unconstitutional regardless of its interference with one's free exercise of religion. (*Abington School District vs. Schempp, supra,* 374 U. S. at 224-5; *Engel vs. Vitale,* 370 U. S. 421, 430; *Fowler vs. Connecticut,* 345 U. S. 57; *McCollum vs. Board of Education,* 333 U. S. 203; *Murdock vs. Pennsylvania,* 319 U. S. 105; *Cantwell vs. Connecticut,* 310 U. S. 296.)

The Court of Appeals failed to subject Chapter 738 to the strict scrutiny required in judging state legislation touching upon fundamental personal rights such as religion. (*San Antonio School District vs. Rodriquez,* 411 U. S. 1, 37-8; *Stanton vs. Stanton,* 421 U. S. 7; *Jimenez vs. Weinberger,* 417 U. S. 628; *Harper vs. Virginia Board of Elections,* 383 U. S. 663, 670; *McGowan vs. Maryland,* 366 U. S. 420, 449.)

In *Congregation Kollel Horabonim vs. Williams,* 48 N. Y. 2d 301, n. 1, 422 N. Y. S. 2d 909, n. 1, the New York Court of Appeals noted the precarious financial plight of "most" American churches.

In this case that Court demonstrated the truth of the principle that the power to tax involves the power to destroy. (*McCullouch vs. Maryland,* 17 U. S. [4 Wheat] 316.)

The decision of the Court of Appeals on the question of the standing of the Town and of the public officials is directly contrary to its decision in *Board of Education vs. Allen,* 20 N. Y. 2d 109, 281 N.Y. S. 2d 799. These plaintiffs have standing to avoid the compulsion to act unconstitutionally on the one hand or subject themselves to

removal on the other. (*Board of Education vs. Allen,* 392 U. S. 236, 241, n. 5.) In any event, since the individual plaintiffs have standing, the other plaintiffs should likewise be heard. (*Baker vs. Carr,* 369 U. S. 186, 204, n. 23.)

Respectfully submitted,

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APPENDIX.

Opinion of the New York Court of Appeals, 52 N. Y. 2d 536, 439 N. Y. S. 2d 303, Decided April 30, 1981.

COURT OF APPEALS,

STATE OF NEW YORK.

3 No. 110

TOWN OF HARDENBURGH, Ulster County, New York, *et al.*,

Appellants,

v.

STATE OF NEW YORK &ano.,

Respondents.

(110) Stephen L. Oppenheim, Monticello, for appellant.

Robert Abrams, Attorney-General (Shirley Adelson Siegel, Jeremiah Jochnowitz, & George M. Thorpe of counsel) for respondents.

WACHTLER, J.:

The plaintiffs are the Town of Hardenburgh and various town officials, who sue in both their individual and official capacities. They commenced this declaratory judgment action on behalf of those property owners

residing in the Town who claim they would be entitled to a religious property tax exemption under section 436 of the Real Property Tax Law as that statute was worded prior to January 1, 1979, but who, under the amended wording of the law, are now unable to qualify for exemption.

The previous version of section 436 reads as follows:

> "Real property held by an officer of a religious denomination shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments, subject to the same conditions and exceptions, as property owned by a religious corporation." (L. 1958, ch. 959)

The current version states:

> "Real property held in trust by a clergyman or minister of a religious denomination for the benefit of the members of his incorporated church or unincorporated church shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments as authorized by section four hundred twenty-one of this chapter; provided that such real property shall satisfy all the conditions and exceptions set forth therein including that the property so held be used exclusively for one or more of the purposes enumerated in paragraph (a) of subdivision one of section four hundred twenty-one of this chapter."

Plaintiffs allege that by requiring church officers to hold the property in trust as a clergyman or minister in order to qualify their property for exemption, the current version contravenes the religious rights under the First Amendment of the United States Constitution of landowners who are officers in the Universal Life Church. The Appellate Division held, in agreement with Special Term, that the

Town of Hardenburgh and the individual plaintiffs suing in their official capacity were without standing. As for the plaintiffs suing in their individual capacity, the court below held that insufficient facts were alleged to raise a justiciable controversy concerning whether these persons actually experienced interference with their First Amendment rights.

At the outset we note that the appeal taken purportedly as of right by the Town and the Town officials must be dismissed for the reason that a substantial constitutional question is not directly involved. The basis of the Appellate Division's affirmance of the dismissal of the complaint of these plaintiffs was not on the merits of the First Amendment challenge, but rather on consideration of the standing of these parties to bring this suit against the State (see, *Black Brook v. State of New York*, 41 NY2d 486, 488). Accordingly, it cannot be said that the asserted constitutional issue was a basis of the decision below. The appeal to this court on that constitutional issue, therefore, does not lie as of right (Cohen and Karger, Powers of the New York Court of Appeals, §57).

As regards the individual plaintiffs, no such procedural impediment exists, and we disagree with the court below that insufficient allegations are presented to pose a justiciable controversy. True, it would be ill-advised on such an undeveloped record as this to declare the statute constitutional in all instances, but we are free, nonetheless, to fashion appropriate declaratory relief, and to determine on the merits that insofar as the statute is applied to these plaintiffs, the constitutional challenge should be rejected (*First Nat. Stores v. Yellowstone Shopping Center*, 21 NY2d 630, 637).

The plaintiffs do not show that the statute does not apply evenhandedly with regard to various religious groups (see, *Walz v. Tax Commission*, 397 US 664, 673), nor, more fundamentally, have they shown any particular religious practice or belief with which the statute interferes.

The supposed infirmities do not, insofar as they apply to the plaintiffs, impose anything more than a reasonable regulation by the State on the manner in which property subject to the religious exemption is to be held.

The State has a significant interest in this area, and the apparent purpose of this enactment—to distinguish church property diverted from the benefit of the congregation into private or non-religious use—has not been shown to have an additional invidious effect (see, *McGowan v. Maryland,* 366 US 420). If the property which plaintiffs seek to have exempted is indeed church property, we do not see what First Amendment right the plaintiffs have to hold the title as private individuals. If, on the other hand, the property truly is privately owned and used, then the effect of the statute in preventing its exemption is no more than a justifiable action to protect the municipal tax base (cf. *Matter of Association of Bar of City of N. Y. v. Lewisohn,* 34 NY2d 143).

Accordingly, the order of the Appellate Division should be modified so as to include a declaration that chapter 738 of the Laws of 1978 is constitutional insofar as it affects this case, and as so modified, affirmed, with costs to defendants.

On appeal by the town and town officials: Appeal dismissed, without costs.

On appeal by the remaining plaintiffs: Order modified in accordance with the opinion herein and, as so modified, affirmed, with costs to defendants.

Opinion by Wachtler, J.

All concur.

Cooke, Ch. J., taking no part.

Decided April 30, 1981

Opinion of the Appellate Division, Third Judicial Department, 72 A. D. 2d 192, 424 N. Y. S. 2d 531.

TOWN OF HARDENBURGH, Ulster County, New York *et al.*,

Appellants,

v.

STATE OF NEW YORK *et al.*,

Respondents.

Supreme Court, Appellate Division, Third Department.

Jan. 31, 1980.

Oppenheim, Drew & Kane, Monticello (Stephen L. Oppenheim, Monticello, of counsel), for appellants.

Robert Abrams, Atty. Gen., Albany (George M. Thorpe and Shirley Adelson Siegel, Asst. Attys. Gen., Albany, of counsel), for respondents.

Before Kane, J. P., and Staley, Main, Mikoll and Herlihy, JJ.

HERLIHY, Justice.

Special Term, at the outset of its decision in this case, found that the Town of Hardenburgh and the individual plaintiffs suing in their official capacity lacked standing to

bring this action against the State. We affirm its dismissal of the complaint as to those plaintiffs for the reasons set forth by Special Term. However, the remaining individual plaintiffs concededly have standing and, thus, the merits must be considered.

The plaintiffs commenced this declaratory judgment action on November 16, 1978 on behalf of all property owners whose properties would have received an exemption under section 436 of the RPTL prior to its amendment by section one of chapter 738 of the Laws of 1978.

Former section 436 of the Real Property Tax Law provided as follows:

> Real property held by any officer of a religious denomination shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments, subject to the same conditions and exceptions, as property owned by a religious corporation. (L. 1958, ch. 959.)

In 1978 the Legislature amended section 436 to provide:

> Real property held in trust by a clergyman or minister of a religious denomination for the benefit of the members of his incorporated church or unincorporated church shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments as authorized by section four hundred twenty-one of this chapter; provided that such real property shall satisfy all the conditions and exceptions set forth therein including that the property so held be used exclusively for one or more of the purposes enumerated in paragraph (a) of subdivision one of section four hundred twenty-one of this chapter.

> For purposes of this section, "clergyman", "minister", "incorporated church" and "unincorporated church" shall be defined as in section two of the religious corporations law. (L. 1978, ch. 738, §1.)

The individual plaintiffs' objection to the change effected by the 1978 amendment is quite simply that they lose their personal tax exemption unless the property to which they hold legal title is equitably owned for the benefit of their religious denomination and they also qualify as a "clergyman" or "minister" of *that* denomination. Special Term found that the change in the statutory language was not one of substance, but simply a clarification of legislative intent.

Former section 436 apparently came into the consolidated laws by chapter 62 of the Laws of 1909 and its language in 1958 was virtually identical with the exemptions as provided in chapter 908 of the Laws of 1896 (see *Matter of Kimberly*, 27 App.Div. 470, 472, 50 N.Y.S. 586, 587). Nevertheless, there is no body of case law construing former section 436. It was observed in the *Kimberly* case that in "numerous" cases property was held "in trust" by members of a religious denomination for such denomination, but the exemption provided by former section 436 was not before that court and not determined by it. However, the statute did not, prior to 1978, explicitly require that equitable title be in a religious denomination. Further, while an officer of a religious denomination might not be someone who would be a spiritual leader thereof, the 1978 amendment, by restricting the exemptions to clergymen and ministers as defined in section 2 of the Religious Corporations Law, has narrowed the class of exempt persons.

Upon its face, the 1978 amendment has changed the scope of the tax exemption by eliminating any tax exemption where the property is not equitably owned by a

religious denomination. Such a change cannot be treated as a mere clarification of the former section 436, which appeared upon its face to simply require a *use* for religious purposes and *not* a concurrent equitable interest by a religious denomination (cf. *Wolek v. City of New York*, 131 Misc. 37, 225 N.Y.S. 669).

The constitutional issue raised in this case is whether or not the 1978 amendment to section 436 interferes with the free exercise of religion. However, there is no allegation or offer of proof which shows that there is an infringement upon the plaintiffs' religion. In particular, the statute, upon its face, does not suggest any legitimate application which would discriminate between religions, and as noted by Special Term there is a presumption of constitutionality in favor of the statute.

Upon a full consideration of the pleadings, there is a failure to establish sufficient facts to raise a justiciable controversy and, accordingly, it was error for Special Term to enter a declaration in favor of any litigant. While we do not necessarily disagree with the finding under the circumstances we do not reach the issue of the constitutionality of section 436 of the RPTL as amended.

The judgment should be modified, on the law, by striking the second decretal paragraph and inserting in its place a provision that the complaint is dismissed as to the remaining plaintiffs, and, as so modified, affirmed, without costs.

Judgment modified, on the law, by striking the second decretal paragraph and inserting in its place a provision that the complaint is dismissed as to the remaining plaintiffs, and, as so modified, affirmed, without costs.

Kane, J. P., and Staley, Main and Mikoll, JJ., concur.

Opinion of the Supreme Court, Special Term, 99 Misc. 2d 1036, 418 N. Y. S. 2d 503.

TOWN OF HARDENBURGH, ULSTER COUNTY, NEW YORK, ROBERT WOODARD, ETHEL WOODARD, LESTER BOURKE, as Supervisor of the Town of Hardenburgh, and ROBERT BARNHART, MARKS BUERGE, and VINCENT PRIOR as Members of the Town Board of the Town of Hardenburgh,

Plaintiffs,

v.

THE STATE OF NEW YORK and THE NEW YORK STATE BOARD OF EQUALIZATION and ASSESSMENT,

Defendants.

Supreme Court, Special Term,
Ulster County.

May 22, 1979.

Oppenheim, Drew & Kane, Monticello, for plaintiffs.
Robert Abrams, Atty. Gen. of the State of New York, Albany, for defendants.

AARON E. KLEIN, Justice.

This class action seeks a declaration that *Real Property Tax Law* §436 as amended in Chapter 738 of the Laws of 1978 is unconstitutional, together with related relief. The plaintiffs are comprised of individual landowners in the Town of Hardenburgh who have enjoyed real property tax exemptions during the fiscal years, having taxable status dates of May 1, 1977 and May 1, 1978 pursuant to §436.

They claim to be officers of a church affiliated with the Universal Life Church, and as such are typical of other officers and landowners in the Town of Hardenburgh who own in excess of two hundred (200) parcels that were heretofore exempted by virtue of §436. The remaining plaintiffs sue in their capacity as elected officials claiming "financial havoc" will reign if the individual plaintiffs are successful in their attack on the amended statute.

The defendants have moved this court for an order dismissing the amended complaint contending the parties asserting the cause of action lack the legal capacity to sue (CPLR 3211[a][3]), and the complaint fails to state a cause of action (CPLR 3211[a][7]). By cross-motion the plaintiffs request an order granting summary judgment (CPLR 3211[c]).

The threshold issue of standing must be dealt with first, though this court's inquiry will not end with it. It has long been held in this state that "(t)he general rule of law is that a political subdivision of the State may not challenge the constitutionality of an act of the State Legislature restricting its governmental powers." *Black Brook v. State,* 41 N.Y.2d 486, 488, 393 N.Y.S.2d 946, 948, 362 N.E.2d 579, 580 (citations omitted) "The attributed principle underlying this well-settled doctrine has been often restated. A local government is merely a political subdivision created by the sovereign State. As such, it exercises its powers subject to the direction and control of the State . . ." *Black Brook, supra,* (citations omitted) At this late date, no question can yet remain that taxation is a governmental rather than a proprietary function. (Cf. *Lorillard v. Town of Monroe,* 11 N.Y. 392, 394[1854]) This court is aware of the present trend toward the softening of the rules for standing. (See *Boryszewski v. Brydges,* 37 N.Y.2d 361, 372 N.Y.S.2d 623, 334 N.E.2d 579) Yet, a court such as this one would not presume to extend standing to a municipality or subdivision thereof by judicial fiat. Thus, at this time, so far as the town officials are concerned,

they lack standing, and the complaint must be dismissed. *City of Buffalo v. State Board of Equalization,* 26 A.D.2d 213, 272 N.Y.S.2d 168.

The defendants next argue that the complaint seeks a prospective ruling and, therefore, fails to state a cause of action for lack of a justiciable issue. "Justiciable Controversy" as set forth in CPLR 3001 represent a codification of prior ". . . statements by the Court of Appeals that there is a constitutional requirement of an actual controversy between adverse parties, and that the courts are not empowered to render advisory opinions, or determine abstract, moot or academic questions." 3 Weinstein-Korn-Miller, N.Y.Civ.Prac. ¶3001.03 (footnotes omitted). Moreover, it appears courts are often required to decide on an ad hoc basis what is justiciable taking into consideration that the primary purpose of a lawsuit is to afford the litigants the opportunity to have a controversy decided which is authentic. (Cf. *New York State Association of Insurance Agents, Inc. v. Benjamin R. Schenck,* 44 A.D.2d 757, 354 N.Y.S.2d 232; 3 Weinstein-Korn-Miller, *supra*)

The declaratory judgment action is, therefore, particularly well suited for the testing of the constitutionality of a statute (see Siegel, New York Practice, p. 581).

Applying these considerations to the situation at bar, this court finds a justiciable controversy exists. The basis of this finding must, of course, be found in the first instance by reviewing the amendment presently challenged. Prior to adoption of Chapter 738 of the Laws of 1978, §436 provided:

> *"Officers of religious denominations.*
>
> Real property held by any officer of a religious denomination shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments, subject to the same conditions and exceptions, as property owned by a religious corporation."

It now contains, in pertinent part, the following language:

> *"Officers of religious denominations*
>
> Real property held in trust by a clergyman or minister of a religious denomination for the benefit of the members of his incorporated or unincorporated church shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments as authorized by section four hundred twenty-one of this chapter; provided that such real property shall satisfy all the conditions and exceptions set forth therein including that the property so held be used exclusively for one or more of the purposes enumerated in paragraph (a) of [the] subdivision one of section four hundred twenty-one of this chapter.
>
> For purposes of this section, 'clergyman', 'minister', 'incorporated church' and 'unincorporated church' shall be defined as in section two of the religious corporation law."

The effect of the amendment is to require a minister or clergyman to hold property in trust for the benefit of the members of the church in order for the property, if otherwise qualified, to be entitled to an exemption.

As the individual plaintiffs apparently were granted exemptions for the two previous years, and if they do not change the manner in which they now hold the property to the form required to obtain an exemption, under the amendment, they will no longer be entitled to an exemption. They ". . . desire to retain ownership in the manner which previously entitled their properties to exemption" (Amended complaint ¶21). It must be assumed (since the first taxable status date has passed) the individual plaintiffs no longer enjoy an exemption. It is, therefore, clear that a presently justiciable controversy is before the court

that the individual plaintiffs now confront the amendment head-long, and this court must necessarily decide the validity of the statute.

"There is a simple, but well-founded, presumption that an act of the Legislature is constitutional and this presumption can be upset only by proof persuasive beyond a reasonable doubt (*Montgomery v. Daniels,* 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444; *Matter of Malpica-orsini,* 36 N.Y.2d [568] at p. 570, 370 N.Y.S.2d[511], at p. 513, 331 N.E.2d[486], at p. 487)" *Hotel Dorset Company, Etc. v. Trust for Cultural Resources of the City of New York et al.,* 46 N.Y.2d 358, 413 N.Y.S.2d 357, 385 N.E.2d 1284 (1978). Where, as here, a court of original jurisdiction is called upon to declare a statute unconstitutional, it ". . . should not set aside a statute as unconstitutional unless that conclusion is inescapable (*Bohling v. Corsi,* 204 Misc. 778, 127 N.Y.S.2d 591, affd. 306 N.Y. 815, 118 N.E.2d 823; *People v. Elkin,* 196 Misc. 188, 193, 80 N.Y.S.2d 525, 530; McKinney's Cons.Laws of N.Y., Book 1, Statutes § 150 [1971])." *People v. Lofton,* 81 Misc.2d 572, 575, 366 N.Y.S.2d 769, 775, affd. 58 A.D.2d 610, 395 N.Y.S.2d 226.

The Court of Appeals in *Hotel Dorset Company, supra,* p. 370, 413 N.Y.S.2d p. 362, 385 N.E.2d p. 1289, had occasion to mention, ". . . a further presumption, long recognized by this court, that the Legislature has investigated and found facts necessary to support the legislation (*I. L. F. Y. Co. v. Temporary State Housing Rent Comm.,* 10 N.Y.2d 263, 219 N.Y.S.2d 249, 176 N.E.2d 822, app. dsmd. 369 U.S. 795, 82 S.Ct. 1155, 8 L.Ed. 285) as well as the existence of a situation showing or indicating its need or desirability, (*Matter of Van Berkel v. Power,* 16 N.Y.2d 37, 40, 261 N.Y.S.2d 876, 878, 209 N.E.2d 539, 540)." It is against this back drop that this court must evaluate the amendment to § 436.

The plaintiffs have provided the court with a number of exhibits collectively known as the legislative jacket. From a review of the memoranda submitted to the Governor from various government agencies and representatives (plaintiffs' Exhibit "A" dated August 4, 1978, Exhibit "B" undated, Exhibit "F" dated July 4, 1978, Exhibit "G" dated July 28, 1978, Exhibit "H" dated July 24, 1978, Exhibit "I" and Exhibit "N" [both undated]), it appears that the justification for the amendment, was to clarify the legislature's original intent in enacting the section which was to require that the minister or clergymen who holds property of an unincorporated association which seeks a tax exemption to do so in trust for the particular church.

The plaintiffs argue that the amendment will have a disproportionate effect on one religious group, the Universal Life Church; it favors other religions; therefore, it denies the individual (sic) defendants equal protection of law, and violates the First Amendment of the United States Constitution as well as this State's constitution. (see amended complaint ¶27) It is significant to note that the amended complaint and other papers submitted by the plaintiffs makes no mention of any religious prohibition against the holding of property in trust. Moreover, it appears they are merely desirous of retaining ownership in the manner previously exempted (amended complaint ¶21).

The United States Supreme Court has said the following about tax exemptions for religiously owned property:

> "The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a

harmonious relationsip to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes."

. . . . .

"Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption." *Walz v. Tax Commission,* 397 U.S. 664, 672-673, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970)

No question is raised about the validity of the statute prior to its amendment. Consequently, it is merely the effect of the clarification which is challenged. It is this court's view that the statute passes the constitutional muster mentioned above. These individual plaintiffs claim no religious impediment to holding property in trust, and the legislative purpose as articulated by the sponsors was not to change any substantive rights. *Walz, supra,* upheld the validity of religious exemptions generally, and the statute with which this court is here concerned comports with the constitutional tests therein.

There has always been a degree of tension to be found in the First Amendment's religion clauses, one guaranteeing free exercise and the other prohibiting the establishment. The fine line which must be drawn between the clauses can be seen by contrasting *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563, which upholds Sunday closing as an indirect burden on one's religious exercise, and *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 which holds unconstitutional a requirement

that a Seventh-Day Adventist be denied unemployment compensation for her failure to be available to work on Saturday. An analogy can be drawn to the orthodox Jews who in *Braunfeld* must as an indirect consequence, sustain an economic hardship as a result of their religious tenets because they must close business on Saturday, and according to law, on Sunday. In the situation here presented the officers, and/or ministers of the Universal Life Church must now hold property in trust for the church to enjoy an exemption from taxation though they desire otherwise.

In the absence of any allegation of specific restriction on the free exercise of the individual plaintiff's religious beliefs, the generally restrictive interpretation to be given real property tax exemptions, (cf. *Matter of Genesee Hospital v. Wagner,* 47 A.D.2d 37, 45, 364 N.Y.S.2d 934, 943, affd. 39 N.Y.2d 863, 386 N.Y.S.2d 216, 352 N.E.2d 133; see also *American Bible Society v. Lewisohn,* 40 N.Y.2d 78, 86, 386 N.Y.S.2d 49, 53, 35 N.E.2d 697, 701) and the continual shrinkage of the tax base, this court must uphold the constitutionality of § 436 as amended.

The plaintiffs have failed to overcome the presumption of constitutionality of proof beyond a reasonable doubt. (*Nettleton v. Diamond,* 27 N.Y.2d 182, 315 N.Y.S.2d 625, 264 N.E.2d 118; *Montgomery v. Daniels,* 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444.)

The motion is granted, the plaintiffs' cross motion denied.

Notice of Appeal.

No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

TOWN OF HARDENBURGH, ULSTER COUNTY, NEW YORK; ROBERT WOODARD; ETHEL WOODARD; LESTER BOURKE, as Supervisor of the Town of Hardenburgh, and ROBERT BARNHART, MARKS BUERGE, and VINCENT PRIOR as members of the Town Board of the Town of Hardenburgh,

Appellants,

against

THE STATE OF NEW YORK and THE NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

SIRS:

Please take notice that Appellants, the Town of Hardenburgh, Ulster County, New York, Ethel and

Robert Woodard; Lester Bourke, as Supervisor of the Town of Hardenburgh and Robert Barnhart, Marks Buerge, and Vincent Prior, as members of the Town Board of the Town of Hardenburgh, and each of them do hereby appeal to the Supreme Court of the United States from the order, judgment, and decision of the Court of Appeals of the State of New York entered April 30, 1981 and from each and every part of that order, judgment, and decision.

In addition to Appellants, the parties to this appeal are the State of New York and the New York State Board of Equalization and Assessment.

This appeal is taken under 28 U.S.C. Section 1257 (2) to review the determination of the Court of Appeals of the State of New York finding Chapter 738 of the Laws of New York for the year 1978 to be constitutional under the Constitution of The United States.

Yours, etc.

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To:

The Clerk of the Supreme Court
of The United States

The Clerk of the Court of Appeals
of the State of New York

The Clerk of Ulster County, New
York

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Attorney General of the State of
New York
The Capital
Albany, New York 12224

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
SEP 30 1981
ALEXANDER L. STEVAS
CLERK

No. 81-226

IN THE

Supreme Court of the United States

October Term, 1981

TOWN OF HARDENBURGH, ULSTER COUNTY, NEW YORK; ROBERT WOODARD; ETHEL WOODARD; LESTER BOURKE, as Supervisor of the Town of Hardenburgh, and ROBERT BARNHART, MARKS BUERGE, and VINCENT PRIOR as members of the Town Board of the Town of Hardenburgh,

Appellants,

against

THE STATE OF NEW YORK and THE NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Questions Presented.

1. May a state which exempts from real property taxation property used for religious purposes limit that exemption to property owned by a religious organization, or held for it in trust by a clergyman or minister, denying the exemption to property owned by such clergyman or minister and held for his own use?

2. Is the contention of appellants that a state may not so limit the exemption from real property taxation of property used for religious purposes sufficient to invoke the jurisdiction of this Court?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981.

TOWN OF HARDENBURGH, ULSTER COUNTY, NEW YORK; ROBERT WOODARD; ETHEL WOODARD; LESTER BOURKE, as Supervisor of the Town of Hardenburgh, and ROBERT BARNHART, MARKS BUERGE, and VINCENT PRIOR as members of the Town Board of the Town of Hardenburgh,

Appellants,

against

THE STATE OF NEW YORK and THE NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

State Law Involved and Nature of the Case.

This appeal seeks review of a unanimous decision of the New York State Court of Appeals dated April 30, 1981

(Wachtler, J.), 52 NY2d 536 (1981) (1a)* which upheld the constitutionality of chapter 758 of the Laws of New York of 1978 (New York Real Property Tax Law, § 436, as amended) insofar as it affects this case (4a). Appeal is apparently taken pursuant to 28 USC § 1257.**

New York State Constitution, Art 16, § 1 requires that exemption from real property taxation be granted for property "used exclusively for *religious,* educational or charitable purposes *as defined by law* and *owned* by any corporation or association organized or conducted exclusively for one or more such purposes and not operating for profit." Real Property Tax Law (RPTL), §§ 420 and 421 effectuate this requirement, and were expressly upheld by this Court against the contention that they violate the establishment clause of the First Amendment to the United States Constitution, made binding upon the states by the Fourteenth Amendment (*Walz v. State Tax Commission,* 397 US 664 [1969], 25 L ed 2d 697).

New York State Constitution, Art. 8, § 12 directs the State Legislature "to prevent abuses in taxation and assessments." Since 1960, the State Board of Equalization and Assessment (SBEA) has been the delegate of the Legislature in this field (RPTL, §§ 200, *et seq.*).

Section 436 of the Real Property Tax Law, here at issue, until 1978 exempted from real property taxation "real property held by any officer of a religious denomination * * * subject to the same conditions and exceptions as [apply to] property owned by a religious corporation." SBEA consistently took the position that RPTL, § 436 was not

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*Page numbers in parentheses refer to pages in the appendix to the jurisdictional statement of appellants.

**No statute or authority conferring jurisdiction on this Court is cited in the jurisdictional statement.

satisfied if the property were owned outright by an officer of a church, unless such officer held the property (in trust) for the benefit of the religious denomination or its members. Otherwise the owner of record would be free to use or alienate exempt property for purely private purposes, including personal profit.

We cannot agree with appellants' statement (Jurisdictional Statement, p 9) that the exemption in RPTL, § 436 dates from 1799, nor can we agree that the length of time a statute is in force somehow diminishes the power of the Legislature to amend its text. In fact RPTL, § 436 is based on provisions dating back to 1893. Chapter 498 of the New York statutes of that year combined provisions exempting property owned by religious corporations (which *did* have antecedents as early as 1799) (*Walz v. State Tax Commission, supra*) with a provision very much like RPTL, § 436, exempting property held by an officer of a religious denomination to the same extent as if the property were held by the religious corporation itself.

Before 1893, State law exempted property devoted to religious use without any stated limitation as to ownership. With the enactment of chapter 498 of the Laws of 1893, which expressly required ownership by a religious corporation to qualify for tax exemption, it became necessary to provide for those denominations which could not form religious corporations (see pp 7-11, *infra*). Exemption of property "held" by an officer of the denomination and used in the same manner as if owned by a religious corporation, was therefore granted. In *Matter of Kimberly*, 27 App Div 470, 474, 4th Dept. (1898), the Appellate Division (New York's intermediate appellate court) described the purpose of this provision:

> "Probably the language used to declare property held by an officer of a religious denomination exempt was inserted to reach a class of cases well

> understood to be numerous in the state, where property is held in trust by a bishop or other officer of a religious denomination."

The instant case is one of several which arose in the Town of Hardenburgh, New York (and the three neighboring towns of Liberty, Rochester and New Paltz) over whether or not the homes and other real property of members of the Universal Life Church may be exempted from real property taxation pursuant to RPTL, § 436. In the Town of Hardenburgh in 1977, 211 parcels were declared by the assessor to be exempt, most on the basis that the owners had been designated as members and officers of the Universal Life Church. In 1978, exemption was granted to 224 parcels (more than 90% of the real property in the Town). In related litigation in State court, the granting of these exemptions by local taxing authorities was challenged by the State Board of Equalization and Assessment and by nonexempt taxpayers in the Town. These cases were consolidated for consideration by the Court of Appeals in *Matter of Dudley v. Kerwick*, 52 NY2d 542 (1981) and *Matter of SBEA v. Kerwick*, 52 NY2d 557 (1981). The Court is respectfully referred to the decisions of the Court of Appeals for a summary of these related proceedings.

Another action arising out of the same circumstances is pending in United States District Court, Southern District of New York. A copy of the complaint in this action is appended hereto (p 5a, *post*). That action challenges the use of government offices and the expenditure of government funds in the Town of Hardenburgh to protect and to promote the Universal Life Church. Plaintiffs there claim standing under the Civil Rights Act of 1871 (42 USC, § 1983) to challenge these activities of the Town as violative of the establishment clause of the First Amendment. The relevance of this District Court action to the

standing of appellants to prosecute the present appeal is discussed at page 13, *infra*.

In 1978 the New York State Legislature expressly adopted the interpretation of section 436 of the RPTL which had been the basis of SBEA's opinion that such exemptions were unauthorized by law. Chapter 738 of the Laws of 1978 amended that section to provide that exemption from real property taxation of property not owned by a religious denomination (and, thus not exempt under RPTL, § 421) would be granted under section 436 if such property is "held in trust by a clergyman or minister of a religious denomination for the benefit of the members of his incorporated church or unincorporated church." This amendment became effective January 1, 1979, and since that date, the number of such exemptions in the Town of Hardenburgh has diminished from (approximately) 224 to 1.

It is emphasized that both the practice of granting exemptions to property owned by individuals outright, and the elimination of the practice effected by the 1978 amendment occurred entirely in the Town of Hardenburgh (and the neighboring towns involved in the related litigation). Throughout the remainder of the State, assessing practices were not significantly affected by the amendment, because exemption had not been sought or granted on the sole basis that the owner claimed to be an officer of a religious denomination.

ARGUMENT.

POINT I.

The criteria on which New York law bases entitlement to exemption from real estate taxation do not promote or inhibit any religion nor do they involve the state in the affairs of any religion. Real Property Tax Law, § 436 which embodies these criteria is not limited in its application or purposes to any one church.

In *Walz v. State Tax Commission, supra* (at p 673), this Court held

> "Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption."

The statute challenged herein clearly falls within the permitted adaptations to changing circumstances contemplated in *Walz*.

There is no dispute that the State may grant exemption from taxation to religious organizations and condition the exemption on factors consistent with this purpose (*Walz, supra*). Nor can it seriously be contended that religious principles prevent the Universal Life Church from satisfying these criteria. Although there may be serious doubt as to whether the State must recognize the Universal Life Church as a true religious denomination, that question has not been ruled on in this litigation. Assuming such recognition, there is no religious doctrine or rule of the Universal Life Church which prevents it from availing itself of the benefits of RPTL, § 436 to the same extent as other churches. As the Court of Appeals observed below (52 NY2d 540-41):

> "The plaintiffs do not show that the statute does not apply evenhandedly with regard to various religious groups (see, *Walz v. Tax Commission*, 397 US 664, 673), nor, more fundamentally, have they shown any particular religious practice or belief with which the statute interferes. The supposed infirmities do not, insofar as they apply to the plaintiffs, impose anything more than a reasonable regulation by the State on the manner in which property subject to the religious exemption is to be held."

All that is required of a church to gain exemption of property used for religious purposes is that it hold the property in its own name (RPTL, § 421) or in the name of another in trust for the church (RPTL, § 436).

These requirements were not created with the Universal Life Church in mind as appellants contend. As indicated in the preceding section (p 3, *supra*), the basic provisions of the New York State Constitution and Real Property Tax Law have long conditioned exemption on ownership of the property by the church. Late in the nineteenth century, however, it developed that some churches and congregations (*Matter of Kimberly, supra*) (notably Catholic and Moravian)* were not able to incorporate and, there-

*In *Baxter v. McDonnell*, 155 NY 83 (1898), 49 NE 667, the Court stated with respect to the holding of property by religious societies or congregations:

> "There is still another mode in which property is largely held in this country for religious or church purposes. In the Moravian congregations, the property devoted to pious uses is held neither by a corporation nor yet by the congregation itself. In some of the congregations, and I presume in all, the title to the churches, school houses and cemeteries is held by the bishop, who transmits it by will to his successor in office. And such is the tenure of most Roman Catholic Churches in the country. The title to the real estate resides in the bishop of the diocese. In a certain sense he is a trustee thereof for religious purposes. * * * [155 NY at 93-94.]"

fore, could not form an entity capable of "owning" otherwise exempt property.

Warren's Weed New York Law of Real Property, 4th ed, 1956, Churches, § 2.01, states:

> "An 'unincorporated church' is a congregation, society, or other assemblage of persons who are accustomed to statedly meet for divine worship or other religious observance, without having been incorporated for that purpose.
>
> "Where a church is not incorporated, it ordinarily takes title to property in the name of its trustees.
>
> * * *
>
> "An unincorporated association cannot acquire title to real property and a deed to such an association generally conveys no legal title."

Case law sustains this position. For example, *Owens v. Missionary Society,* 14 NY 380 (1856), held that a devise to an unincorporated association was invalid and that where no trustees competent to take are named, the Court had no jurisdiction to uphold such a devise. See, also, *Mount v. Tuttle,* 183 NY 358 (1906).

The State, by the predecessor of present RPTL, § 436, chapter 498 of the Laws of 1893, recognized the procedure by which such churches placed title to their property in a clergyman or officer for the benefit of the church and its members. The individual owner of record could not alienate the property, other than to pass it on to his successors within the church (see, e. g., *Van DeBogert v. Reformed Dutch Church,* 128 Misc 603, affd 219 App Div

220, 2d Dept [1927]). The statute therefore authorized exemption of property used for religious purposes and "held for" a religious denomination. The statute in this form continued until 1978, when the amendments involved in this case were made.

By 1978, events in the Town of Hardenburgh made it clear that more specific legislative direction was required to prevent abuse and inequality in the granting of religious tax exemptions. In the Town of Hardenburgh, large numbers of exemptions were being granted under section 436 in a manner which was not deemed lawful by the State Board of Equalization and Assessment or other communities throughout the State.

The fact that a particular local situation serves to focus the need for legislative change does not convert such legislation, otherwise general in its application, to an illegal legislative attack on the persons or organizations involved.

While concededly a statute which unconstitutionally singles out an individual or group, will not be saved because it is general in its terms (Jurisdictional Statement, p 8), it is equally true that a statute which is general in its application is not subject to challenge merely because some particular person or event provoked its enactment (*Collin v. Smith*, 447 F Supp 676, 682 [USDC, Mich], affd 578 F2d 1197 [7th Cir], cert den 439 US 916, 58 L ed 2d 264 [1978]), nor even if that person or incident were named in the enactment (*Nixon v. Administrator of General Services*, 433 US 425, 471, 53 L ed 2d 867, 908 [1977]).

New York has long required a trust relationship as evidence that the owner of property "holds it for" a church before granting exemption. This requirement protects both the public and the church. It assures that the

substantial financial benefits of tax exemption will be applied to the tax-exempt purpose and not diverted to private purposes.

As the Court of Appeals stated below (at p 541):

> "The State has a significant interest in this area, and the apparent purpose of this enactment—to distinguish church property diverted from the benefit of the congregation into private or non-religious use—has not been shown to have an additional invidious effect (see, *McGowan v. Maryland,* 366 US 420). If the property which plaintiffs seek to have exempted is indeed church property, we do not see what First Amendment right the plaintiffs have to hold the title as private individuals. If, on the other hand, the property truly is privately owned and used, then the effect of the statute in preventing its exemption is no more than a justifiable action to protect the municipal tax base (cf. *Matter of Association of Bar of City of N. Y. v. Lewisohn,* 34 NY2d 143)."

Thus, even if, as appellants contend, prior law did not contain the same requirement as the challenged statute, the statute would still be within the power of the Legislature to enact.

Control of the method of ownership and disposal of church property has long been governed by State law and subject to legislative change. Section 6 of the Religious Corporations Law provides that religious corporations may acquire real property but limits the nature of the property which they may acquire. Section 12 of such law provides special limitations on the sale or mortgage of real property of religious corporations. These statutory inhibitions on the ownership and sale of real property of religious corporations have never been held to violate any constitutional right.

> "The primary purpose of the Religious Corporations Law is to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust."
>
> *St. Nicholas Cathedral v. Kedroff,* 302 NY 1, 29 (1950).

Religious Corporations Law, § 2 distinguishes between incorporated and unincorporated churches. As has been noted (*supra,* p 7), the property of an unincorporated church is held in the name of a trustee. If such a church incorporates, Religious Corporations Law, § 4 provides that the corporation succeeds to such property. In enacting the amendments to RPTL, § 436, at issue here, the Legislature relied on these established and nondiscriminatory principles of church ownership of property in framing a response to the purely secular problem of possible use of religious tax exemptions for private purposes. No reason has been offered by appellants why this response should not have been recognized by the courts.*

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*The State action challenged in this case is thus well within that found by this court to be within the police power in *Heffron et al. v. International Society for Krishna Consciousness, Inc.*, ___ US ___ (49 CW4762). In *Heffron* the activity subjected to state regulation was a religious rite (Sankirtan).

POINT II.

Appellants lack standing to bring this appeal and it should be dismissed.

Dismissal of the present appeal is appropriate for the same reasons as affirmance is required. Not only have appellants failed to present a constitutional question requiring plenary consideration and argument before this Court, they have also utterly failed to present any substantial Federal question (Sup Ct Prac, 4th Ed, Stern, R.L. & Gressman, E., Bur of Nat Affs Inc, Washington, DC, 1969, pp 358-9).

Moreover, considerations of standing also require dismissal. The Town of Hardenburgh and its officers attack the constitutionality of chapter 738 of the Laws of 1978. But the Town is a territorial subdivision of the State created by the State Legislature as a municipal corporation for the administration of certain delegated governmental powers and, as such, it cannot challenge the constitutionality of an enactment by the Legislature, its creator. The officers of the municipality have no greater power than the Town. See *Black River Regulating District v. Adirondack League Club,* 307 NY 475 (1954), app dsmd 451 US 922. This principle, that a state subdivision cannot challenge the constitutionality of the legislation of its creator, is recognized in this Court. See *Williams v. Mayor,* 289 US 36, 40 (1933); *Trenton v. New Jersey,* 262 US 182 (1923) and *Newark v. New Jersey,* 262 US 192 (1923).

The State courts below have recognized and applied this principle with respect to the Town and its officers. Nevertheless, with respect to the individual plaintiffs the Court of Appeals held (52 NY2d 540):

> "As regards the individual plaintiffs, no such procedural impediment exists, and we disagree with the court below that insufficient allegations are presented to pose a justiciable controversy. True, it would be ill-advised on such an undeveloped record as this to declare the statute constitutional in all instances, but we are free, nonetheless, to fashion appropriate declaratory relief, and to determine on the merits that insofar as the statute is applied to these plaintiffs, the constitutional challenge should be rejected (*First Nat. Stores v. Yellowstone Shopping Center,* 21 NY2d 630, 637)."

It now appears, however, that the present appeal is being pursued only by those parties (the Town and its officers) who clearly lack standing to do so (see affidavit of Peter Bouman Esq., annexed hereto p 2a).

Even apart from the question of standing, it should be noted that the Town and its officers violate the very provisions they seek to assert when they prosecute with Town funds, litigation to protect the purported interests of the Universal Life Church and its members. Assuming the Universal Life Church represents a religion, as appellants allege, this is clearly a governmental action which violates all three tests enunciated in *Lemon v. Kurtzman,* 403 US 602 (1971), 29 L ed 2d 745, recently reaffirmed in *Committee for Public Education and Religious Liberty v. Reagan,* ____ US ____ (1980), 63 L ed 2d 94; it has a "religious" purpose; its effect is to favor a particular "religion"; and, most significantly it continues to entangle the Town government inextricably in the affairs of that "religion." Although a challenge to this attempt by the Town to establish the Universal Life Church is now pending in the United States District Court, Southern District of New York (see p , *supra*), this Court should not countenance

this aspect of the Town's activities. Since the Town and its officers are the only parties responsible for this appeal, it should be dismissed.

CONCLUSION.

The motion of appellees to dismiss or affirm should be granted.

Respectfully submitted,

ROBERT ABRAMS,
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Attorney for Appellees,
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(518) 474-7572.

SHIRLEY ADELSON SIEGEL,
Solicitor General,
FRANKLIN K. BRESELOR,
Assistant Attorney General,
Of Counsel.

APPENDIX.

Affidavit of Peter H. Bouman.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1981.

TOWN OF HARDENBURGH, ULSTER COUNTY, NEW YORK; ROBERT WOODARD; ETHEL WOODARD; LESTER BOURKE, as Supervisor of the Town of Hardenburgh, and ROBERT BARNHART, MARKS BUERGE, and VINCENT PRIOR as members of the Town Board of the Town of Hardenburgh,

Appellants,

against

THE STATE OF NEW YORK and THE NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

State of New York,
County of Broome, ss:

PETER H. BOUMAN, being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice in the State of New York, a member of the firm of Coughlin & Gerhart, attorneys for James Dudley, Orson R. McCumber, Judith McCumber, Norman Day, Jr. and Allison Fairbairn, all of whom except Norman Day are now real property owners in the Town of Hardenburgh, New York and subject to real property taxation.

2. I am familiar with the following facts and make this Affidavit in connection with the issue of the granting of standing to the Town of Hardenburgh and its officials to prosecute this appeal.

3. On or about November 28, 1978, James Dudley, Judith and Orson R. McCumber, Norman and Kathleen Day, Jr. and Allison Fairbairn, who are not members of the Universal Life Church, commenced an action in the United States District Court, Southern District of New York against the Town of Hardenburgh and its officials. The action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983. A copy of the Second Amended Complaint in this action is attached hereto as Exhibit "A".

4. This action seeks, *inter alia,* a declaration that the actions of the defendant Town and its officials in sponsoring, favoring and establishing the Universal Life Church in the Town of Hardenburgh are unlawful and seeks an injunction prohibiting these defendants from furthering the establishment of the Universal Life Church in the Town of Hardenburgh.

5. All discovery has been completed in this action and on January 9, 1981, a joint Pretrial Order was submitted to the Honorable Mary Johnson Lowe, United States District Judge.

6. According to a letter dated August 31, 1981 addressed to all counsel in the Civil Rights Action, District Judge Lowe is assessing whether this Federal Civil Rights Action should proceed to trial or whether the District Court should abstain pending resolution of cases in New York State Court. (e. g. *Mtr. of Dudley v. Kerwick,* 52 NY2d 542 [1981])

7. On November 9, 1978, The Town Board of the Town of Hardenburgh resolved to authorize the attorney for the Town to commence an action to declare Chapter 738 of the New York Laws of 1978 to be unconstitutional. A copy of the minutes of the Town Board for November 9, 1978 is attached hereto as Exhibit "B".

8. Paragraph 39 of the Second Amended Complaint attached hereto as Exhibit "A" (p. 12) alleges that this legal action financed by Town funds was commenced for the principal reason of defending, furthering and preserving the legal position of Universal Life Church adherents.

9. On September 17, 1981, counsel to the Town of Hardenburgh advised me that this appeal is in fact being financed with Town funds.

10. James Dudley, Orson R. McCumber, Judith McCumber and Allison Fairbairn are not members of the Universal Life Church and are subject to taxation on their real property in the Town of Hardenburgh as are all other qualified members of the Petitioner class in *Mtr. of Dudley v. Kerwick,* 52 NY2d 542 (1981).

11. On behalf of Allison Fairbairn, Orson McCumber, Judith McCumber, and James Dudley and the Petitioner class of non-Universal Life Church members whom he represents, deponent respectfully requests this Court to consider whether or not the Town of Hardenburgh and its officials have standing under the Establishment Clause of the First Amendment to the United States Constitution to proceed with this appeal.

12. It is their position in this regard that the Town violates the Establishment Clause by advocating a cause using general Town funds which principally inures to the benefit of those who adhere to the Universal Life Church Doctrine.

PETER H. BOUMAN

Sworn to before me this
17th day of September, 1981
ROBERT JUDSON SMITH
Notary Public in the State of New York
Resident in and for Broome County
My Commission Expires March 30, 1983

Exhibit A, Annexed to Affidavit of Peter H. Bouman—Second Amended Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES DUDLEY, ORSON R. MCCUMBER, JUDITH MCCUMBER, KATHLEEN and NORMAN DAY, Jr., and ALLISON FAIRBAIRN,

Plaintiffs,

vs.

ROBERT KERWICK, Individually and as sole assessor of the Town of Hardenburgh, New York, VINCENT PRIOR, Individually and as a Town Board Member of the Town of Hardenburgh, New York, LESTER BOURKE, Individually and as Supervisor of the Town of Hardenburgh, New York, GEORGE HILLRIEGEL, Individually and as a Town Councilman of the Town of Hardenburgh, New York, ROBERT BARNHART, Individually, and as a Town Councilman of the Town of Hardenburgh, New York, ZANE E. SHAVER, Individually and as a member of the Town Board of the Town of Hardenburgh, New York, EDWIN SHAVER, Individually and as a member of the Town Board of the Town of Hardenburgh, New York, MARKS BUERGE, Individually and as a member of the Town Board of the Town of Hardenburgh, New York, CAL CRARY, Individually and as Planning Board Chairman of the Town of Hardenburgh, New York, EDWIN SHAVER, NINA HAYNES, ELIZABETH BURCHARD, ROBERT BARNHART, EILEEN PRIOR and BOWMAN OWENS, In-

dividually and as members of the Town of Hardenburgh Board of Assessment Review and the TOWN OF HARDENBURGH, NEW YORK,

Defendants.

78 Civ 5672
MJL

Plaintiffs, for their Second Amended Complaint, allege as follows, upon information and belief:

1. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983 and under the First and Fifth Amendments of the United States Constitution. The jurisdiction of this court is grounded upon 28 U.S.C. § 1343 and 28 U.S.C. § 1331. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00) as to each plaintiff.

2. Plaintiffs, James Dudley, Allison Fairbairn, Orson R. McCumber, Judith McCumber, Kathleen Day and Norman Day, Jr., are and were residents of the Town of Hardenburgh, Ulster County, State of New York who owned real property in that town in the years 1977 and 1978, still own said property and have paid real estate taxes thereon during the years 1977 and 1978.

3. Defendant, Robert Kerwick, resides at 150 Wall Street, Kingston, New York, and during the years 1977, 1978, and to the present time has acted in an official capacity as sole assessor of the Town of Hardenburgh.

4. Defendant, Vincent Prior, resides at Dry Brook Road, Arkville, New York, and during the years 1977, 1978, and to the present time has acted in an official

capacity as a Town Board member of the Town of Hardenburgh.

5. Defendant, Lester Bourke, resides at Upper Beaverkill Road, Lew Beach, New York, and during the years 1977, 1978, and to the present time has acted in an official capacity as Town Supervisor of the Town of Hardenburgh, New York.

6. Defendant, George Hillriegel, resides at Millbrook Road, Margaretville, New York, and during the years 1977 and 1978, and to the present time has acted in an official capacity, as a Town Councilman of the Town of Hardenburgh, New York.

7. Defendant, Robert Barnhart, resides at Lew Beach, New York, and during the years 1977, 1978, and to the present time has acted in an official capacity as a Town Councilman of the Town of Hardenburgh, New York.

8. Defendant, Edwin Shaver, resides at Lew Beach, New York, and during the year 1978 and to present time has acted in an official capacity as Superintendent of Highways and as a member of the Town Board of the Town of Hardenburgh.

9. Defendant, Marks Buerge, resides at Millbrook Road, Margaretville, New York, and during the years 1977, 1978, and to the present time has acted in an official capacity as a Justice of the Peace and a member of the Town Board of the Town of Hardenburgh.

10. Defendants, Edwin Shaver, residing at Lew Beach, New York, Nina Haynes, residing at Dry Brook Road, Arkville, New York, Robert Barnhart, residing at Lew Beach, New York, Eileen Prior, residing at Dry Brook Road, Arkville, New York, Bowman Owens, residing at

Livingston Manor, New York, and Elizabeth Burchard residing at Margaretville, New York, acted in official capacities during the years 1977 or 1978 or both and to the present time as members of the Town of Hardenburgh Board of Assessment Review.

11. Defendant, Cal Crary, resides at Lew Beach, New York, 12753, and during the years 1976 and until on or about April 1, 1977, served in an official capacity as Planning Board Chairman of the Town of Hardenburgh.

12. Defendant, Zane E. Shaver, resides at Lew Beach, New York, and during the years 1976 and 1977 served in an official capacity as a town justice and a member of the Town Board of the Town of Hardenburgh.

13. Defendant, Town of Hardenburgh, is a municipal corporation organized under the laws of the State of New York lying within the Southern District of New York, and located in the County of Ulster.

14. Defendant, Robert Kerwick, was appointed as sole assessor by the Hardenburgh Town Board for the principal reason that he was favorably inclined toward an asserted religious doctrine known as the Universal Life Church. On or about January 9, 1977, the defendant took office and remains in office to this day.

15. Commencing on or about August 22, 1976, and thereafter, defendants Lester Bourke, Cal Crary, Marks Buerge, George Hillriegel, Vincent Prior, Zane Shaver and other of the defendants, acting in their official capacities and under color of state law, embarked upon a deliberate course of conduct to sponsor, encourage, facilitate, entice, and compel real property owners in the Town of Hardenburgh to become practicing members, ministers or officers

or "churches" of an organization which they assert to be a religion and hereinafter referred to as the Universal Life Church.

16. Commencing on August 22, 1976, and continuing during the remainder of the year 1976 and during the years 1977 and 1978, the defendant, Lester Bourke, as Town Supervisor, with the approval of the Town Board and defendant Kerwick, called and conducted town meetings at the Turnwood Community Hall and at the Dry Brook Community Hall where he urged owners of real property in the Town to join in the Universal Life Church. At some of said meetings, the defendant town officials arranged to have a certain Cardinal George McLain present to ordain town residents in the said church and instruct them in the religion of "Universal Humanism" as enunciated by the Reverend Kirby J. Hensley. At said meetings the defendant Bourke and other of the defendants instructed said owners with regard to tax exemptions to be derived from and to be afforded to them by reason of affiliation with the Universal Life Church.

17. Defendant, Lester Bourke, in his capacity as Town Supervisor, called a town meeting to be held on September 13, 1976, at the Turnwood Community Hall. In his official capacity he caused notices to be printed in local newspapers. These notices were paid for with town funds, and such payments were audited and approved by the town board. Said advertisements encouraged town members to attend by suggesting that each taxpayer could receive total tax exemption and the notices were signed by defendant Lester Bourke as supervisor of the Town of Hardenburgh. At said meeting, defendants Bourke and Crary addressed the group and importuned each and every resident present to join the Universal Life Church. One Cardinal, George McLain, then performed mass ordinations of the people present. Cardinal McLain was invited to attend the meeting by defendants Bourke and Crary and

the mass ordinations occurred due to the facilitation and suggestion of defendants Bourke and Crary, and other defendants.

18. Defendant Bourke, with the approval of the Town Board, subsequently called further town meetings, in the Drybrook and Turnwood Halls on October 16, 1976, November 20, 1976, December 4, 1976, March 12, 1977, and on other dates where he and other of the defendants solicited citizens of the town to join the Universal Life Church; where ordinations were held; applications for tax exception for religious reasons were distributed, explained and accepted by defendants, and where legal advice regarding the Universal Life Church was disseminated by Attorney Stephen Oppenheim, who in 1977 was authorized and paid by the Town Board with town funds to defend and further the legal status of the Universal Life Church.

19. On April 2, 1977, and on other dates in April, the defendant Bourke, acting under color of state law, with the approval of the Town Board and using town funds called mass town meetings at the Turnwood Community Hall and the Dry Brook Community Hall where the defendants Kerwick, Bourke, and other of the defendants again importuned and advised town residents to join the Universal Life Church.

20. Defendant Bourke and the Town Board had advised taxpayers to personally or by telephone contact defendant Kerwick with regard to joining the Universal Life Church. Kerwick, during the year 1977, had advised all landowners in the town to join the Universal Life Church and facilitated their joining of said church.

21. Defendant Crary, as Town Planning Board Chairman, from August 22, 1976, to January, 1978, personally

importuned everyone in the Town of Hardenburgh to become members of the Universal Life Church and purposely arranged to have Universal Life Church Bishop George McLain present at town meetings on September 13, 1976, October 16, 1976, and other subsequent dates where the said McLain performed religious ordinations on property either rented by the town or used consistently by the town for governmental purposes.

22. Defendant Zane E. Shaver, as a member of the Town Board, and acting under color of state law, along with defendants Bourke, Buerge, Hillriegel and Prior, voted at regular meetings of the Town Board in 1976 and 1977 and approved the expenditure of town funds, the use of town facilities and the appointment of town officials for the primary purpose of fostering the Universal Life Church. Defendant Zane E. Shaver, along with the entire Town Board were aware of defendant Kerwick's avowed purpose to make every citizen a Universal Life Church adherent and said defendants authorized and furthered such activity as town officials.

23. Defendant Bourke, acting under color of state law as supervisor of the town, with the knowledge and consent of the Town Board, used his office and official position to foster the growth of the Universal Life Church and used his office as a distribution center for Universal Life Church application forms, covenants, information and ordinations.

24. At the instance and request of the defendant Town of Hardenburgh officials during the months of February, March and April of 1977, the defendant Kerwick, as sole assessor of the town, accompanied by defendant, Vincent Prior, a town councilman, Marks Buerge, a town justice and other of the defendants acting under color of state law, using among other methods, documents paid for with

town funds, personally importuned nearly every real property owner in the Town of Hardenburgh to become practicing members, officers, ministers, or churches of the Universal Life Church. The said officials, acting under color of state law, impliedly or directly threatened some residents in the town with higher taxes and possible loss of their property due to high tax burdens should they refuse to become affiliated with the Universal Life Church.

25. The defendant town officials instructed town taxpayers to meet at the home of town supervisor, Lester Bourke, or at the Dry Brook Community Hall for the purpose of joining or becoming affiliated with the Universal Life Church and then filing for total exemption from real propety taxes on the grounds that said officers, churches or ministers used their property for religious purposes.

26. Commencing on September 13, 1976, and during the years 1977 and 1978, the defendant town officials provided forms at town expense for town taxpayers to fill out to aid in making them officers or ministers in the Universal Life Church. Special town counsel had drawn and then reviewed said forms with a view toward facilitating tax exemptions for the said church officers.

27. As a result of the coercion, encouragement, facilitation and solicitation performed by the defendant town officials, approximately 186 real property owners in the Town of Hardenburgh out of a town population of approximately 239 persons became officers or ministers in the Universal Life Church during the year 1977. With the aid of the defendants, they subsequently applied for and were granted wholly tax exempt status by the defendant town assessor and the defendant members of the Board of Assessment Review.

28. The plaintiffs, Dudley, Fairbairn, McCumber and Day could not, by reason of their own convictions with regard to religion, become affiliated with the Universal Life

Church or subscribe to the teachings of the Reverend Kirby J. Hensley, and they did not do so although importuned by the defendant town officials to affiliate themselves with the church.

29. The entire Board of Assessment Review during the years 1977 and 1978 were officers of the Universal Life Church and, acting under color of state law, granted discriminatory preference to applications for wholly exempt status submitted by fellow adherents of the Universal Life Church and the teachings of Reverend Kirby J. Hensley.

30. The defendant town officials hired at town expense special counsel Stephen Oppenheim of Monticello, New York, specifically or primarily to defend and further the religious tax exemptions granted by the town officials.

31. During the years 1976, 1977 and 1978, the said defendant town officials, acting under color of state law, solicited and demanded that sums of money be paid to the Universal Life Church by the said wholly exempt property owners as a condition of their continued exempt status. Portions of the money so demanded by the defendant town officials were turned over to Universal Life Church Secretary Christina Hourigan at Turnwood, Ulster County, and portions of said money were used by the defendant town to finance the defense of the religious exemptions granted and to pay for additional administrative work in connection with the church.

32. During the years 1977 and 1978, the defendant town officials through special town counsel Oppenheim and other of the defendants provided Universal Life Church officers, ministers, or churches with instructions and forms to aid them in maintaining their tax exempt status on the basis of the religion called the Universal Life

Church. Universal Life Church forms and applications were distributed at town meetings and elsewhere by defendants.

33. On April 22, 1978, and April 29, 1978, the town assessor and the Town Board of Assessment Review, all of whom adhered to the teachings of the Universal Life Church except the sole assessor Kerwick, conducted hearings relative to real estate tax exemptions applied for by Universal Life Church officers. Said hearings were geared by the town officials, acting under color of state law, specifically toward the exemption of property owned by Universal Life Church affiliates. Certain Universal Life Church officers never appeared at said hearing to apply for exemptions but were granted tax exempt status nonetheless. At said hearings special town counsel Oppenheim advanced detailed legal arguments in support of the position of this asserted religion.

34. As a result of said hearing, approximately 238 parcels of real estate in the Town of Hardenburgh were granted wholly exempt status for 1978 by virtue of affiliation with the Universal Life Church.

35. On June 2^, 1978, the Town of Hardenburgh held a real property tax grievance day at the Turnwood Community Hall at which special town counsel Stephen Oppenheim, assisted by defendant Kerwick, petitioned the defendant Board of Assessment Review to remove churches, officers, or affiliates of the Universal Life Church from the tax rolls. The members of the said Board of Assessment Review, all being adherents of the Universal Life Church doctrine, acting in their official capacities, assisted each other and themselves in removing their own properties from the tax rolls on an asserted connection with religious purposes. The defendant Board of Assessment Review exceeded the published closing time of the

hearing specifically in order to receive the petitions for tax exemptions of Universal Life Church affiliates. Said petitions were presented *en masse* by special town counsel Oppenheim. Defendant Kerwick himself corrected some petitions presented by Universal Life Church affiliates if the same were not technically in order and all petitions presented were preemptorily granted *en masse* by the defendant Board of Assessment Review for asserted religious reasons.

36. In 1978, the Board of Assessment Review, acting under color of state law, disregarded its legal duty and made no independent determinations of the taxable status of fellow Universal Life Church adherents but granted, in a discriminatory manner, total tax exemptions to those persons solely on the basis of asserted affiliation with this particular religion.

37. The defendant Town has paid and plans to pay in the future with town funds special counsel Oppenheim substantial legal fees for his defense, fostering and aid to the Universal Life Church ministers, officers or churches.

38. Special Town Counsel, while being paid with town funds and upon the authorization of the Town Board, using community buildings on November 11, 1978, at an open town meeting and on previous dates, gave legal advice to Universal Life Church adherents, encouraged town citizens to join said church and apply for tax exemption, and facilitated citizens in joining said church.

39. On November 9, 1978, at a regular meeting of the Town Board, defendants Bourke, Buerge, Hillriegel, Barnhart and Prior voted to authorize attorney for the town Oppenheim to commence and proceed with a legal action, using town funds, for the principal reason of defending, furthering and preserving the legal position of

Universal Life Church adherents including themselves. Oppenheim proceeded with said action using town funds and, upon information and belief, is pursuing the litigation to the present time at the behest of the defendant town official.

40. The said defendants, acting under color of state law, have from August 22, 1976, on and during the years 1977 and 1978, used their official positions and employed the organs of town government for claimed religious purposes to the direct damage of the plaintiffs who because of their own religious views, could not and did not affiliate themselves with the religion set up by the defendants. The defendants are continuing this course of conduct to this day.

41. The defendant, Town of Hardenburgh, during the years aforementioned and presently has secretly and overtly, under color of state law, carried out an official policy to establish the claimed religion known as the Universal Life Church, and has caused its officials and employees to violate the plaintiffs' constitutional rights.

42. By their actions, the defendants, acting under color of state law, have established the Universal Life Church and the teachings of the Reverend Kirby J. Hensley as the town religion, have inhibited the free exercise of plaintiffs' beliefs, and have deliberately created excessive government entanglement with religion in the Town of Hardenburgh.

43. The plaintiffs have been forced to pay a disproportionately greater amount of real estate taxes during the 1977 and 1978 tax years because, on the basis of their own ethical and religious convictions, they refused to affiliate themselves with the Universal Life Church or subscribe to the religious views of the Reverend Kirby J. Hensley.

44. The acts of defendants, under color of state law and under color of their authority as officials of the Town of Hardenburgh, as hereinabove set forth, have deprived the plaintiffs of rights guaranteed to them as citizens of the United States of America by Amendment I of the Constitution of the United States, and Section I of Amendment XIV of the Constitution of the United States, and Amendment V of the Constitution of the United States.

WHEREFORE, the plaintiffs respectfully request that this court:

1. Adjudge and declare that the actions of defendants in sponsoring, favoring and establishing the Universal Life Church in the Town of Hardenburgh are unlawful;

2. Temporarily and permanently enjoin the defendants from favoring and furthering the establishment of the Universal Life Church in the Town of Hardenburgh;

3. Award to each of the plaintiffs the damages suffered by them as a result of defendants' unlawful actions;

4. Assess against each of the defendants exemplary and punitive damages as a result of their illegal and unconstitutional acts; and

5. Grant to the plaintiffs their costs, disbursements, reasonable attorneys' fees, and such other relief as may be proper.

Dated: Binghamton, New York
August 10, 1979

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Attorneys for Plaintiffs

Exhibit B, Annexed to Affidavit of Peter H. Bouman—Minutes of Town Board Meeting Held November 9, 1978.

REGULAR AND BUDGET HEARING

The regular meeting of the Town Board and public hearing on the 1979 Budget, held at the Town Clerk's office November 9, 1978 was called to order at 8 pm with the following Board members present: Supervisor Bourke, Justice Buerge, Councilmen Hillriegel, Barnhart, and Prior. Also Superintendent Shaver, Clerk Buerge and Assessor Kerwich.

Town Residents attending the Budget Hearing were Mrs. Schroeder, Mrs. Young, Mrs. Burchard. Also Mr. Coughlin of Binghamton.

Mrs. Young questioned the high legal expenses budgeted. Mr. Kerwick explained that legal fees have to be paid because of actions taken against the Town—actions which were not instigated by the Town/

Mr. Kerwick and Mr. Coughlin descussed the legal actions brought against the Town by Mr. James Dudley.

Mr. Coughlin also questioned the use of Town funds to defend Assessor Kerwick with Mr. Bourke again explaining that the Town has no choice but to defend our Assessor.

Mrs. Schroeder agreed that the high cost of legal services is the result of legal actions taken against the Town.

Mr. Buerge and Mr. Kerwick pointed out that the amount in the Budget for legal fees has to cover the unanticipated fees for 1978.

Mrs. Young suggested that it might be possible to accept donations for the financial relief of the Town. Mr. Bourke had some doubts as to the legality of such a plan.

Mr. Bourke summarized the reasons why the 1979 Budget is so high: 1) Unrealistic 1978 Budget; 2) Unexpected legal fees; and 3) machinery breakdowns and necessary replacements.

Mrs. Schroeder asked why there arent more highway workers in this part of the Town; and why can't the Town get help with highway expenses? Mr. Bourke said he is looking into ways of getting surplus machinery; but the prospects are not very favorable.

Health insurance for Town Employees was discussed.

The Budget Hearing was closed at 10 pm and the regular Board Meeting called to order.

Minutes of the October meeting were read and accepted as read by MOTION by Barnhart, seconded by Buerge, and carried.

Bills were audited and entered on Abstract 11-78. In Gen. 56-69 Highway 132-157.

A MOTION by Bourke, seconded by Barnhart, appointing Lee Wulff to the Town Planning Board was carried

A MOTION by Barnhart, seconded by Buerge, reappointing Eileen Prior to Board of Assessment Review was carried.

A letter from Attorney Oppenheim was read in regard to the legality of Chapter 738 of the Laws of 1978 and its effect on the Town.

Mr. Buerge offered the following Resolution which was seconded by Prior and unanimously adopted.

RESOLVED, that this Town Board feels that Chapter 738 of the Laws of 1978 is unconstitutional.

The following Resolution was offered by Councilman Vincent Prior and seconded by Supervisor Lester Bourke:

Whereas, this Town Board has, by Resolution, expressed its conviction that Chapter 738 of the Laws of 1978 is unconstitutional; now, therefore, be it

RESOLVED, to authorize Attorney for the Town Oppenheim, to commence an action to declare Chapter 738 of the Laws of 1978 to be unconstitutional.

Votes: Ayes—Bourke, Buerge, Barnhart, Hillriegel, Prior.
Noes—none Adopted, November 9, 1978

The Board discussed the 1979 Budget and the following Resolution; was offered by Hillriegel, seconded by Prior and unanimously adopted.

Whereas, this Town Board has met at the time and place specified in notice of public hearing on the Preliminary Budget and heard all persons desiring to be heard thereon, now, therefore, be it

RESOLVED that this Town Board does hereby adopt such Preliminary Budget as originally compilled as the annual Budget of the Town for the fiscal year beginning January 1, 1979, and that a summary of such budget be entered in the minutes of the proceedings of this Town Board, and be it further

RESOLVED that the Tax Clerk shall prepare and certify duplicate copies of said annual budget as adopted by this Town Board and deliver one copy thereof to the Supervisor to be presented by him to the County Legislature.

Meeting adjourned by motion by Barnhart, seconded by Buerge and carried. Adjournment at 1 am.

Appellant's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS
CLERK

No. 81-226

IN THE

Supreme Court of the United States

October Term, 1981

TOWN OF HARDENBURGH, ULSTER COUNTY, NEW YORK; ROBERT WOODARD; ETHEL WOODARD; LESTER BOURKE, as Supervisor of the Town of Hardenburgh, and ROBERT BARNHART, MARKS BUERGE, and VINCENT PRIOR as members of the Town Board of the Town of Hardenburgh,

Appellants,

against

THE STATE OF NEW YORK and THE NEW YORK STATE BOARD OF EQUALIZATION AND ASSESSMENT,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief in Opposition to Motion to Affirm or Dismiss

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Brief in Opposition to Motion to Affirm or Dismiss.

POINT I.

Chapter 758 of the Laws of New York of 1978 constituted a change of pre-existing law.

The motion to dismiss or affirm repeatedly implies that the "in trust" provision of Chapter 758 did not change pre-existing law (motion, pp. 2-3, 5, 8, 9-10). Indeed, the motion goes so far as to say that "New York has long required a trust relationship as evidence that the owner of property 'holds it for' a church before granting exemption" (motion, p. 9).

This statement is directly contrary to the holdings below. The decision of the Appellate Division on this point states:

> Upon its face, the 1978 amendment has changed the scope of the tax exemption by eliminating any tax exemption where the property is not equitably owned by a religious denomination. Such a change cannot be treated as a mere clarification of the former section 436, which appeared upon its face to simply require a use for religious purposes and *not* a concurrent equitable interest by a religious denomination. (Cf. *Wolek v. City of New York*, 131 Misc. 37.) (*Town of Hardenburgh vs. State of New York*, 72 A. D. 2d 192, 424 N. Y. S. 2d 531, 532-3.)

POINT II.

The predecessor of Real Property Tax Law §436 was not adopted for the benefit of the Catholic Church or any other specific church.

Contrary to the suggestion made at page 7 of the motion, the predecessor to Real Property Tax Law §436 was

not adopted because Catholic or other churches could not incorporate in 1893.

Although the State has repeated that statement on many occasions, it has never cited one piece of legislative history to support it.

On the contrary, historical examination proves the statement to be untrue.

Incorporation of Catholic churches has been specifically authorized in New York since 1863 (Chapter 45 of the Laws of 1863). The general incorporation statute dates to Chapter 60 of the Laws of 1813.

Catholic churches quickly took advantage of the right to incorporate and transferred their properties to corporations. The record on appeal below contains the following statement of the New York State Catholic Conference as part of the material submitted to the governor in support of Chapter 758:

> Real property owned by the Roman Catholic Church in New York is owned exclusively by corporations organized under the Religious Corporations Law, or the Not-For-Profit Corporation Law, or by Special Act of the Legislature. Roman Catholic Church property in New York State is not held in the name of any individual.
>
> The historical practice of holding property in the name of the Bishop of a Roman Catholic Diocese was discontinued in the latter part of the 19th century when legislation was enacted to enable Roman Catholic Churches to incorporate. Since that time, all property which was formerly held in the name of the Bishops for the church has been transferred into a corporate ownership (R/A 41-42).

What may have been a problem before 1863 was no longer a problem in 1893.

If, in fact, the predecessor statute was adopted for the benefit of the Roman Catholic Church, that is further evidence that no trust was required. Roman Catholic bishops held as individuals, not as trustees. This is clearly indicated by the material elided from the quotation in the footnote at page 7 of the motion. The opinion goes on to say:

> "* * * but there is no declaration of trust, and he controls the enjoyment and transmits the title by devise. The purpose of this arrangement is to exclude the laity from that power of interference which they would have were the title vested in a corporation. But, inasmuch as the holders of such title are not corporations, either sole or aggregate, as are the English bishops, deans, and even parsons, lands held by them do not pass to their successors in office unless through the instrumentality of a deed or will" (*Baxter vs. McDonnell,* 155 N. Y. 83, 84).

Whether or not the statute was adopted for the benefit of the Roman Catholic Church, it was a general statute and benefited the Universal Life Church as well.

POINT III.

Chapter 758 was adopted solely to thwart the growth of the Universal Life Church.

The record below contains the materials constituting the "bill jacket" of materials submitted to the Governor in regard to Chapter 758. The materials submitted by the bill's sponsors and supporters make it clear that the purpose of the legislation was to thwart the growth of the

Universal Life Church while leaving "legitimate" and "bona fide" churches unaffected (R/A 37, 46).

Counsel to the New York State Division of Equalization and Assessment specifically advised the Governor that this legislation "was introduced as a result of the Universal Life Church litigation" (R/A 46). He went on to say:

> We do not believe that amendment would have any effect on bona fide religious properties currently entitled to its benefits. Nor do we believe that the statute is widely used today, since the major churches for which it was originally enacted may now hold title in the name of the church. Those organizations are currently enjoying exemption from taxation pursuant to section 420 of the Real Property Tax Law (R/A 46).

To be sure that the Governor did not miss the message, one of the memoranda contains the notation: "Universal Life Church case in Hardenberg" (R/A 37).

The State has never been able to show any other contemporary church affected by Chapter 758, and it is clear that no other was intended to be affected by this legislation.

POINT IV.

This appeal is being pursued by the individual appellants.

This appeal, and each step below, has been taken by the individual appellants as well as by the Town.

The statement at page 13 of the motion that "the present appeal is being pursued only by those parties (the

Town and its officers) who clearly lack standing" is totally without foundation.

As an officer of this Court, the attorney for appellants affirms that the appeal is being prosecuted on behalf of Ethel Woodard (Robert Woodard having died and his interest in their property having passed to Ethel Woodard by the entirety) and the Town officials individually. Each of the Town officials is a taxpayer member of the Universal Life Church who has been denied exemption solely as a result of the adoption of Chapter 758.

Paragraph 9 of Mr. Bouman's affidavit is an incomplete statement of our conversation.

It is correct that the Town has paid for services rendered to it in this litigation. However, as I also told Mr. Bouman, this litigation is not dependent on Town funds and will proceed on behalf of the individuals even if this motion should be successful as to the Town and the officials *qua* officials. If necessary, Mrs. Woodard will proceed alone.

In no sense have Mrs. Woodard or the officials as individuals abandoned this action.

Wherefore it is respectfully prayed that the motion to dismiss or affirm be denied.

Respectfully submitted,

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